as are customarily cut down for that purpose. A note to this case collates the other authorities on right of tenant to cut wood for fires or fences.

TITLE TO AEROLITE—In *Oregon Iron Co.* v. *Hughes*, 81 Pac. 572, the Supreme Court of Oregon, held that an aerolite, though not buried in the earth, is real estate belonging to the owner of the land and not personal property, in the absence of proof of severance. See also *Goodard* v. *Winchell*, 86 Iowa, 71, 52 N. W. 1124, 17 L. R. A. 788, 41 Am. St. Rep. 481; *Ferguson* v. *Ray*, 44. Or. 557, 77 Pac. 600, 102 Am. St. Rep. 648.

DRUGGISTS — PRESCRIPTION — REFUSAL TO DELIVER — LIABILITY. —In *White* v. *McComb City Drug Co.*, decided by the Supreme Court of Mississippi in July, 1905 (38 So. 739), it was held that where a retail drug company willfully refused to deliver to plaintiff his prescription for medicine after having refused to fill the same for the reason that it claimed that plaintiff owed it a bill, it was liable for the damages sustained.

It was further held that where a retail drug company refused to deliver medicine compounded under plaintiff's prescription except on immediate payment of the price in cash, and the medicine was thereupon never delivered, defendant was not entitled to retain the prescription after demand, as a record of its business or as an instrument of evidence.

The court said in part: "But we cannot assent to the proposition that an apothecary who has refused to deliver the medicines called for in the prescription, because the party presenting it is unable or unwilling to comply with his terms as to payment, can retain in his possession the prescription, against a demand for its return. So to hold would be to place the sick largely at the mercy of the apothecary, and to cause suffering, and maybe death, to the poor, in cases where a demand for a cash payment would not be complied with. The rule contended for on behalf of appellees is not necessary for their protection. When a prescription is presented they can easily ascertain before compounding the medicines whether their terms as to payment will be complied with. If the medicines are not delivered, they can have no need of the prescription as record of their business or as an instrument of evidence. Having received a prescription, we think they should either deliver the medicines or return the prescription."

SALES OF MERCHANDISE IN BULK—IS VA. STATUTE UNCONSTITUTIONAL? SEC. 2460A, VA. CODE 1904.—We have had occasion often to refer to decisions on the constitutionality of the statutes recently enacted in regard to the sale of merchandise in bulk. Statutes on this subject have been adopted in twenty different states or jurisdictions and their constitutionality has been questioned in many cases. More than one-half of these statutes were enacted in 1903-1904 and nearly all of them since 1900. It seems, therefore, reasonable to conclude that they are the result of organized crusades,

on the part of certain people, who, acting in concert, have endeavored to fasten them upon the laws of the different states.

Our statute was passed Jan. 2nd, 1904 (see Acts 1902-3-4, pp. 518, 884), and may be found in section 2460a, Va. Code 1904.

The statute of New York, which is very similar to our statute, was held by a majority of one of the Appellate Division of the New York Supreme Court to be constitutional in the case of *Wright* v. *Hart*, 33 N. Y. L. J. 174, 11 Va. Law Reg. (June No.), 143; but that decision has been recently reversed by the Court of Appeals by a bare majority of one, in the case of *Wright* v. *Hart*, decided Oct. 3, 1905, 34 N. Y. L. J. 165.

The Court held the law unconstitutional on the double ground:

1. That the vendor and vendee are deprived of liberty and property without due process of law through interference with their power to contract;

2. That they are deprived of equal protection of the laws, in that the provisions of the act affect merchants only and no other class of the community.

After an examination of the interpretation by the courts of the words "liberty" and "property" as used in the constitutions, and after an analysis of the statute, the Court said:

"No one will have the temerity to suggest that this drastic and cumbersome statute is not in restraint of the rights of 'liberty' and 'property' as those terms have been judicially declared to have been used in the Federal and State constitutions. It is contended, however, that the restraint which it imposes upon these rights is justifiable under that shibboleth of legislatures and courts known as the police power. Far be it from us to deny the existence of that power or to attempt to define its extent. It will be our effort, rather, to show that the Statute under consideration is, in some particulars, so thoroughly unrelated to the probable object of its enactment, and in others so cumbersome, burdensome, unreasonable and unworkable as to violate every one of the constitutional provisions under which it is challenged. The rights of 'liberty' and 'property,' as we have seen, are sacred and substantial rights guaranteed by the Federal and State constitutions. Any law that interferes with the right to make and enforce contracts affects both the liberty and property of the citizen. The right to sell and purchase merchandise in bulk is no less under the protection of the constitution than the right to sell and buy in the smallest possible quantities. Any legislative interference with either of these rights, that is clearly forbidden to the other, can only be justified on the ground of public necessity, which is but another way of saying that it is for the general welfare."

The Court then goes on to examine the requirements of the statue and concludes that they are too drastic and cumbersome, and refutes the contention that the restraint which the statute imposed upon the vendor and vendee, is justifiable under the police power. On this point the Court said:

"Let us again emphasize the assertion that we do not question the power of the Legislature to enact reasonable laws for the prevention of

frauds and the protection of creditors. That this right falls within the general scope of the police power no one will deny. But the police power only begins where the constitution ends. Broad and comprehensive as the police power concededly is, and incapable of precise definition or exact demarkation as we know it to be, it is never difficult to determine that its limits have been transcended when it is clear that the sacred domain of the constitution has been trespassed upon. And when the exercise of the police power clearly infringes upon vested constitutional rights, courts should not concern themselves with the probable purposes for which it is exercised, or the evils which it was designed to correct. First the constitution and then the police power. The statute under consideration sweeps away the constitutional rights of liberty and property of a limited class of our citizens who are entitled to the equal protection of the laws with all other citizens. It invades the right of liberty because it arbitrarily and unnecessarily denies the right of a specified class of citizens to contract for, bargain and sell a particular kind of property. It violates the constitution in prohibiting all sales of merchandise in bulk, whether honest or dishonest, except upon conditions that are harsh, drastic, unreasonable and unnecessary in so far as they do not tend to effectuate the objects for which such a statute may properly be enacted. It ignores the constitutional guaranty relating to property rights, because it so restricts the right of contract as to deprive property of its characteristics as such."

There were filed strong dissenting opinions by Vann, J., and Cullen, Ch. J., justifying the statute on the ground that it was intended to prevent fraud and was for the benefit of the whole people; and while admitting that it disturbed the freedom to contract, it was contended that this was no greater than in other cases sanctioned by law; e. g., fixing the price of elevating grain (*People* v. *Budd*, 117 N. Y. 1; *Munn* v. *Illinois*, 94 U. S. 113); the prohibition of options to buy or sell grain at a future time (*Booth* v. *Illinois*, 184 U. S. 425), and the annulment of all contracts for the sale of corporate stocks for future delivery or on margin (*Otis* v. *Parker*, 187 U. S. 606).

In commenting upon the decisions in other states, Vann, J., says:

"A statute with the same object attained by a similar remedy has been held valid by the highest courts in Massachusetts, Connecticut, Tennessee and Washington (*J. P. Squires and Co.* v. *Tellier*, 185 Mass. 18; *Walp* v. *Mooar*, 76 Conn. 515; *Neas* v. *Borches*, 109 Tenn. 398; *McDaniels* v. *J. J. Connelly Shoe Co.*, 30 Wash. 549). An act declaring such sales presumptively fraudulent was assumed to be valid by the courts of last resort in Wisconsin and Maryland (*Fisher* v. *Herrmann*, 118 Wis. 424; *Hart* v. *Roney*, 93 Md. 432).

"On the other hand, a statute with more exacting conditions was held unconstitutional in Ohio (*Miller* v. *Crawford*, 70 U. S. 207), and a similar act met the same fate in Utah, where a violation of the statute was made a crime (*Block* v. *Swartz*, 27 Utah, 387). The weight of authority, thus far

announced, is in favor of the validity of such legislation. The general grounds upon which it has been sustained are well illustrated by the following extract from the opinion of the Supreme Court of Massachusetts:

"'A purchaser to be safe, has only to see that the vendor's creditors are provided for. The vendor may sell freely, without regard to the statute, if he pays his debts. The legislature, when contemplating this legislation, had occasion to consider and balance against each other the general right of property owners to make contracts and dispose of their property, and the general right of creditors to be paid, and to have reasonable opportunities secured to them for the collection of their debts. That this is within a class of legislation for which there is constitutional authority is too plain for question. The object of it is like that of our numerous statutory provisions which authorize attachments on mesne process, and establish courts with all the necessary machinery for the collection of debts. The statute requires of the vendor nothing that cannot be done with reasonable effort. If he is unable or unwilling to pay his debts, it puts a substantial obstacle in his way to dispose of his stock of merchandise in bulk and to receive payment for himself. But under such circumstances, the property in most cases ought not to be sold in bulk without first giving creditors an opportunity to consider what ought to be done with it (*J. P. Squires and Co.* v. *Tellier*, 185 Mass. 18, 20).'"

C. B. G.